SATELLITE BROADCASTING AND COMMUNICATIONS ASSOCIATION

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Federal Communications Commission
Office of Secretary

May 30, 1997

Mr. William F. Caton
Secretary
Federal Communications Commission
1919 M Street, NW
Room 222
Washington, DC 20554

Re: Direct Broadcast Satellite Public Service Obligations, MM Docket 93-25

Dear Mr. Caton:

The Satellite Broadcasting and Communications Association (SBCA) respectfully submits the attached comments for consideration in the above-captioned proceeding. Please find enclosed an original and fifteen copies pursuant to the Commission's rules to be distributed to the appropriate parties.

Sincerely,

Andrew R. Paul
Senior Vice President

ARP/mh
Enclosures

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Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 25	)	
of the Cable Television Consumer	)	MM Docket 93-25
Protection and Competition Act	)	
of 1992	)	
	)	
Direct Broadcast Satellite	)	
Public Service Obligations	)	

REPLY COMMENTS OF THE SATELLITE BROADCASTING AND COMMUNICATIONS ASSOCIATION OF AMERICA

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REPLY COMMENTS OF THE SATELLITE BROADCASTING AND COMMUNICATIONS ASSOCIATION OF AMERICA

I. Introduction.

The Satellite Broadcasting and Communications Association of America ("SBCA") is pleased to submit to the Commission its reply comments in the above referenced proceeding. After carefully reading the comments filed by parties interested in the DBS public service obligation, we have identified two principal areas that we will address herein. The first deals with the practicalities of operating a DBS business in a national marketplace and the competitive challenges that entails. The second issue concerns the utilization of this proceeding as a platform for other regulatory and competitive matters unrelated to DBS public service requirements, some of which are not even within the FCC's jurisdiction.

II. The DBS Marketplace Is Highly Competitive, And Service Providers Need Flexibility In Order To Offer Programming To Consumers.

The unique competitive features of the DBS industry are worth repeating at this stage. These video providers offer a private, national subscription service which represents the primary, viable competitor to the cable industry. The five operating DBS systems[1] which presently serve consumers are the product of highly entrepreneurial investments by the creative companies and business persons who make up the industry today. While the promise of the industry is substantial, no DBS platform provider has yet achieved financial profitability. There is no doubt, however, that DBS will make its mark in the video distribution marketplace given the time and flexibility to fulfill its potential.

The industry must now live up to the mandate of Section 25 and allot a not insignificant portion of channel capacity to public service programming. In its Further Comments, the SBCA set forth a reasoned approach to how DBS providers can meet their required obligations. However, compliance is no easy matter, despite the views of DAETEC, *et al.* who do not recognize the current status of DBS, particularly given the fact that DBS represents only 5% of total TV households.

[1] DIRECTV, USSB, Echostar, Alphastar, and Primestar are the extant service providers.

The issues in this proceeding must be examined in light of the major feature of the DBS industry: it faces a duality of competition in the marketplace. Federal policy has encouraged DBS to compete with the cable operators who are regional and local wireline video distributors. But by virtue of the national footprint of a satellite, DBS service providers also compete with one another on a national basis. Thus, DBS providers face rampant competition both from cable operators and each other, and therefore the factor of system differentiation plays a critical role in DBS marketing plans.

In view of these marketplace factors, the FCC must allow DBS providers the maximum possible flexibility in shaping their respective public service program packages. While there may be some commonality in carriage of certain program services such as PBS or C-SPAN, providers should be permitted to develop their own approaches to fulfilling the obligation so the public is presented with choice. Provider-originated programming, for example, may give a particular DBS company the competitive edge it believes it needs to capture its target audience and increase its subscriber base. Furthermore, each provider has a unique system configuration and designs its own program packages. Flexibility in formatting the public service line-up and giving the provider the opportunity to design its own public service objectives can only enhance a system's uniqueness.

A. Section 25(a) Requirements.

In view of the previous discussion, DAETEC, *et al.*'s proposals for DBS are overly zealous and do not fit with the operating realities of today's DBS industry. For example, DAETEC, *et al.* seem not to understand the ramifications of utilizing national DBS for local or even regional programming. As we stated in our comments, both in this round and in 1993, the national scope of a satellite's footprint makes anything but national broadcasting an inefficient use of very valuable spectrum. The carriage of local or regional programming would not, as DAETEC,*et al.* claim, enable the public to "realize a return on its investment."[2] To the contrary, it would be a less appropriate use, given the investment in DBS spectrum.

The same rationale applies to the use of DBS for federal candidates. We are hard pressed to understand why subscribers in Nevada, for example, would want to see a House or Senate candidate from, say, Georgia who had access under DAETEC, *et al.*'s proposal, or, on the other hand, what benefits a candidate might derive from buying national reach. Unlike television broadcasters or cable operators, DBS has no local presence. So while Section 312(a)(7) may be explicit with regard to broadcasters, the Commission has no experience or precedent for applying this requirement to a national, multichannel subscription service. Furthermore, making <u>any</u> channel requested by a

[2] DAETEC, *et al.*, at 2.

candidate available under Section 25(a) may not be possible, given the subscription programming contractual commitments of a typical DBS operator. The access required should be fulfilled on those channels where the DBS service provider has control of time which subscribers who wish to view political broadcasts can access. This is a more practical approach for a multichannel subscription service compared to the broadcast model.

DAETEC, *et al.* incorrectly read Section 25(a) as imposing additional capacity set-aside obligations on DBS providers. They ignore the plain language of the statute. Based on their erroneous interpretation, DAETEC, *et al.* recommend an additional requirement of 3% devoted to "civic programming," other local programming, etc. Thus, DAETEC, *et al.* is urging the Commission incorrectly to require DBS providers to set aside up to 10% of channel capacity to fulfill the cumulative requirements of Sections 25(a) and (b), even though the statute clearly sets 7% as the maximum that must be reserved. DAETEC, *et al.*'s proposal creates a new set-aside condition which is clearly beyond anything contemplated by Congress when it enacted Section 25. It should be rejected, as should its suggestion that the Commission should establish specific programming requirements under Section 25(a) other than those enumerated in the statute.

B. Eligibility For Section 25(b).

SBCA and its DBS members are concerned about the quality of the public service programming which will be carried nationwide on the satellite systems. Many entities, seeing an opportunity to gain national exposure for the first time on a multichannel platform, will attempt to gain access, regardless of their qualifications. If the Commission's rules aren't clear with regard to eligibility, there may be a flood of would-be public service entities competing for time on DBS. Such a situation would create confusion and an administrative nightmare among service providers, may deprive truly eligible programmers from access, and may generate an unnecessary administrative burden for the Commission.

In addition, to attract viewers the programming must have a national appeal to bring further quality and value to the DBS operator's program package and serve to distinguish it from competing operators. Thus there is a need to determine whether there is truly sufficient programming of this class to fill the channels to be made available. In our Further Comments, we raised questions which we would be pleased to assist the Commission in answering, particularly with regard to what constitutes "non-commercial," and whether subscription services or services supplied by certain for-profit entities could be eligible.

For example, some commenters, such as Primestar Partners and Encore Media Corporation, urged a broader definition of "non-commercial programmer"

For example, some commenters, such as Primestar Partners and Encore Media Corporation, urged a broader definition of "non-commercial programmer" in order not to exclude certain commercial programmers who have made a strong commitment to "programming of an educational or informational nature." Program services such as The Learning Channel, Knowledge TV, WAM, Discovery and Animal Planet are all significant representatives of what "commercial" programmers can contribute to an ever-widening field of popular "educational or Informational" programming. SBCA endorses consideration of such programming as qualifying for the Section 25 obligation, and we would urge the Commission not to automatically discount their importance in the larger view of determining what is "public service" television.

We would also propose that political progamming sponsored by non-commercial entities also qualify. Events such as Presidential debates, the airing of features and documentaries designed to educate the viewing public concerning current political issues, and other similar programming have significant public interest appeal. They, too, should be considered as eligible.

All of these factors are important and have yet to be addressed in a national, multichannel subscription setting such as DBS. These types of programs give the Commission an opportunity to analyze the Section 25 requirements on a grander scale and not be limited to the definition of "public service" as traditionally applied to local distribution models.

Finally, we are perplexed by the DAETEC, *et al.* proposal regarding use of the Section 25(b) capacity, specifically in instances where a DBS provider cannot fill capacity above 4% (assuming that the Commission, despite our urging that 4% be the requirement, adopts a higher standard). The approach DAETEC, *et al.* envision is convoluted and impractical. They propose filling extra capacity (again, assuming that there is extra capacity) with programming that is "80% noncommercial," provided that these programmers donate 5% of their revenues to a so-called programming consortium. In the first place, SBCA is not aware of program services which maintain a predominantly non-commercial status, but yet have a 20% for-profit component. If such an entity truly exists, we would be mystified why it would forego 5% of its revenues to fund a programming consortium. Is DAETEC, *et al.* proposing that these programmers donate 5% of their revenues, or do they really mean the DBS providers should pay up? How does this relate to DAETEC, *et al.*'s further proposal that DBS providers have the right to "pay down" channel capacity above 4% that isn't used? Neither approach has merit. Each represents a special "tax" and entails a compensation framework which the Commission does not have the authority to adopt.

C. Channel Requirements.

We stated in our Further Comments that DBS providers were committed to providing 4% of channel capacity upon the inception of the Commission's

rules. However, it is unrealistic to include in the channel base used to determine the 4% requirement channels other than video offered to subscribers. The sliding scale requirements proposed by DAETEC, *et al.* are unworkable in that they include base channels which may or may not even exist. Further, it is not a clear and simple delineation of how the requirement would be calculated and would only result in confusion among DBS operators who utilize their channels in different formats. The formula which SBCA offered to determine public service channel carriage is more realistic and can be applied easily and practically by each platform.[3]

It is important to exclude the channels which we identified in our Further Comments. They are essential for the administration of the subscription service, installation and technical adjustments, subscriber messages, and other operating features of the system; or they are audio-only, barker channels or "convenience" channels. The language of Section 25(a) mandates for DBS providers "public interest or other requirements for providing video programming" (emphasis added). "Video" is the guiding principle in establishing the reservation, and the Commission should thus make "video channels offered to the public" the principal basis for measuring that reservation.

[3] The notion that a DBS operator would purposely downsize to avoid a greater public service obligation (see DAETEC, *et al.*, page 14, footnote 7) is totally without merit and fails to consider the business goal of the operator to provide a viable subscription service to consumers.

The insistence by DAETEC, *et al.* that the Commission require the capacity to be available 45 days after the release of its order fails to recognize the working of the DBS marketplace and the administrative burdens and the contractual obligations inherent in running a system. DBS operators simply cannot flip a switch to make capacity available and offer acceptable, national, public service programming. They are first constrained by the requirements of existing program contracts. Where necessary, some of those contracts may have to be renegotiated. Also, national public service programming which meets qualitative criteria to satisfy a national subscribing audience must be selected. Those criteria as well as the selection process itself will take considerable time to develop and implement. It is important to DBS providers that their offerings complement already existing programming and increase the subscriber appeal of their packages, and that subscribers be notified in time of those changes. Finally, appropriate engineering is necessary to redesign systems to the format(s) that the Commission's rules will allow. These are important considerations which must be factored into a transition period. Forty five days is a non-starter and hardly begins to facilitate a reasonable transition. SBCA's recommendation of two years is an appropriate period.

IV. "Editorial Control" Means Control Over Content And Nothing Else.

SBCA commended and agreed with the Commission in relieving DBS providers from any liability over editorial content of public service programming. DAETEC, *et al.*'s interpretation, however, appears to be an attempt to restrict a

DBS operator's ability to actually select particular program services for the public service requirement. DAETEC, *et al.* misinterpret the statute when they state, "But it is impossible to read Section 25(b)(3) in any way that permits a DBS provider to exercise any choice in programming or content. Editorial control necessarily includes selecting from among programmers," and later, ". . .there are already proven methods by which qualified programming can be selected outside the control of the DBS provider."[4]

Liability for program content and actual selection of programming are two different issues. Section 25(b) deals with the former but not the latter. In the first place, multichannel subscription services such as DBS must have the right to make unique program service selections both to fit their respective program packages and formats and to differentiate themselves from their cable and DBS competitors. Further, there is no basis for declaring that Section 25(b) "closely tracks the PEG and leased access cable models, where cable operators are similarly barred from having editorial control,"[5] and automatically applying that precept to a national, multichannel subscription service.

[4] DAETEC, *et al.*, at 18.
[5] Id.

DAETEC, *et al.*, however, is correct in agreeing with SBCA that DBS operators should be relieved of all liability for program content. We explained in greater detail in our 1993 Comments the potential effect that "indecent" programming had on home satellite transmissions in general, including the plight of satellite operators and their lack of control over program material. We would agree with DAETEC, *et al.* regarding the necessary immunity of DBS providers from content liability. As we stated, however, interpreting that immunity to bar program service selection is a stretch with which we soundly disagree.

IV. DBS Operators Should Not Be Required To Subsidize More Than 50% Of The Direct Costs Of Eligible Public Service Programmers.

Congress was perfectly clear when it enacted the section dealing with "reasonable prices, terms and conditions" for certain public service program access to a DBS platform. While programming and channel capacity are the most visible features of a DBS system, substantial and complex hardware and software, elaborate construction, and sophisticated engineering are necessary to provide for their creation and functioning. The statute specifically excluded "marketing costs, general administrative costs, and similar overhead costs" in order to reduce the basis against which an eligible public service programmer would be charged for its 50% of the direct costs. But Congress never suggested that the Commission "should set rates far below 50% of direct costs, so that the cost of access is at, or near, zero."[6]

[6] Id., at 22.

We do not disagree with DAETEC, *et al.* over the language of the statute on its face. However, we believe it is inappropriate to fail to take into account other, significant investments that resulted in the creation of the DBS systems to which public service programmers will have access. In other words, to the extent that a sophisticated video service platform exists which these programmers can use to their advantage, it is only reasonable that they be asked to share in the investment risk at a rate of 50% of the appropriate costs.

Many of the other costs referred to by the Commission in its 1993 NPRM are directly related to the construction of the satellite, maintenance of the system infrastructure, and its implementation in the marketplace. That the Commission flagged these elements for consideration is an indication that it readily understood the magnitude of the investment required to deploy a DBS system. Congress never intended for DBS access to be totally without charge, and these costs must not be overlooked.

V. Comments Not Related To The Direct Application Of The Public Service Obligation Should Be Dismissed Out Of Hand By The Commission.

Comments submitted by U S WEST and the Small Cable Business Association ("SCBA") serve no useful purpose in this proceeding. They are using the NPRM merely as a platform for harsh, anti-competitive arguments

which will not help the Commission approach the difficult task of establishing the parameters and format of DBS public service obligations. The Commission should disregard the comments.

Nevertheless, a few of the matters raised in the filings require some response on the part of the satellite industry. Both US WEST and SCBA, as representatives of the cable television industry, are obviously concerned about competition between cable and DBS. They claim their recommended approach would be to equalize the regulatory structure between the two competitors. But doing so would ignore fundamental technology, marketplace and operating differences which, in the final analysis, is what has created the marketplace diversity and competition that the Commission has long pursued as a matter of public policy.

Cable is a regional and local wireline distributor of television programming. Because of its local area dominance, it is subject to regulation by both the FCC and local franchising authorities. The fees the industry pays to the latter are for the use of public rights-of-way, easements, etc. which cable operators require to install the necessary physical distribution plant. Compared to DBS, cable enjoys several structural advantages. First, cable faces little, if any, local, subscription-based competition, and few cable operators have "effective competition" in their service areas. In addition, cable has practically no competition from within its own industry, with the exception of a handful of

overbuilds As we have stated, DBS is a national subscription service which competes for viewers not only with cable companies but also with other DBS providers. If DBS were subject to the Commission's "effective competition" rules (which are designed for cable), the industry would be "fully competitive" with no exception.

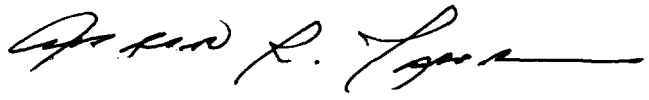
Given these differences, we are hard pressed to understand SCBA's arguments regarding "parity" and "localism" and how and those principles should be part of this proceeding. It is a feeble attempt to equate DBS with cable when there are few, if any, grounds, much less public policy reasons, to do so. In reality, the 4-7% reservation of channel capacity contained in Section 25 is the first time that Congress has actually "appropriated" capacity in a specific amount for public service programming. In attempting to fashion new rules for the use of that capacity, the Commission will have to design a public service framework in a national format, against the backdrop of fierce competition, something that has not been previously done. US WEST and SCBA should have offered constructive comments to assist the Commission in the task at hand, and having elected not to, the Commission should disregard their comments.

VI. Conclusion

Congress has handed the Commission a difficult and complex chore in applying a public service requirement to DBS service providers. Because they

are private, national subscription services, reaching a practical and workable approach will require careful consideration of a host of new factors. These waters are uncharted. The Commission should examine closely the structural, operating, and competitive characteristics of DBS systems. They differ substantially from their wireline competitors, and many of the public service parameters that apply to local distributors of television programming do not apply to a national service. In any event, the DBS industry is prepared to work with the Commission in arriving at a reasonable and satisfactory approach to meeting these obligations.

Respectfully submitted,



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